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August 13, 2010

FILED/ACCEPTED

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Dr.
Capitol Heights, MD 20743

AUG 13 2010

Federal Communications Commission
Office of the Secretary

Re: Appeal of USAC Commitment Adjustment Decisions
CC Docket No. 02-6
Request for Review
Request for Waiver

Applicant Name: Morrow County School District 1
Billed Entity Name: Morrow County School District 1
Billed Entity Number: 145127
FCC Registration Number: 0012534509
471 Application Numbers: 361855; 366035; 413243
Funding Request Numbers: 980359, 994429, 1135124

Dear Secretary Dortch:

This law firm represents the Morrow County School District, Oregon (the "School District" or "MCSD"). On behalf of the School District, we hereby supplement our appeals to the Federal Communications Commission ("FCC") that were previously filed and accepted on February 11, 2009. Such appeals are in regards to the January 15, 2009 Commitment Adjustment Decisions of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") relating to funding years 2003 and 2004. We also request a waiver of relevant policy, rules and/or deadlines.

I. PROCEDURAL BACKGROUND

USAC transmitted to the School District three Commitment Adjustment Letters ("COMADs") dated January 15, 2009, seeking the return of \$2.3 million in E-Rate funding based on an alleged improper relationship between a former School District employee, Nate

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Arbogast, and an E-Rate vendor, Morrow Development Corporation ("MDC"). See Exh. 1 (Notification of Commitment Adjustment Letters). On February 11, 2009, the School District filed with the FCC its initial "placeholder" appeal, pending a full inquiry with the assistance of counsel, in relation to the COMAD letters. See Exh. 2 (MCSD Letter of Appeal re: Notification of Commitment Adjustment Letters). The School District now makes its supplemental submission in support of its position on appeal.

As set forth below, the School District complied with all of the applicable regulations in making its applications for E-Rate funds. Accordingly, the FCC should grant the School District's appeal of the COMAD letters. To the extent that the COMAD letters issued to the School District represent a pronouncement of a new aspect of E-rate regulation, the School District requests a waiver of such new rule.

II. OVERVIEW OF USAC'S DECISIONS

The three COMAD letters at issue in this appeal all make the following conclusions:

During the course of a review it was determined that the school employee who was involved in determining the services sought by the applicant and the selection of the applicant's service providers is associated with a service provider that was selected. Nate Arbogast, the technology director of the school [district] [sic] is also an employee of the service provider selected to provide services for this FRN. FCC rules require applicants to submit a Form 470 to initiate the competitive bidding process, and to conduct a fair and open process. Neither the applicant nor the applicant's consultant should have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow it to unfairly compete in any way. Since the applicant has engaged in an improper relationship with a selected service provider, which represents the conflict of interests [sic] and compromises the competitive bidding process, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the applicant and service provider.

Exh. 1 (Notification of Commitment Adjustment Letters). The School District disagrees with USAC's conclusions for the reasons discussed below.

III. FACTUAL BACKGROUND

1. Overview of the School District.

The School District is located in Morrow County, Oregon, which is a rural and sparsely populated part of north-central Oregon. While the county is geographically large, covering more than 2,000 square miles, the population is only approximately 11,100. The School District

includes nine schools, and serves the towns of Boardman, Irrigon, Heppner, and Lexington. Collectively, the School District enrolls approximately 2,300 students from kindergarten through the 12th grade. As of 2003 over 60% of the School District's students were eligible for the National School Lunch Program ("NSLP"). The School District currently employs 12 full-time administrative employees.

2. The School District's History with E-Rate.

The School District, like many similar districts throughout the country, has in the past experienced some confusion with respect to the nuances of the E-rate program. Indeed, during the timeframe that is the subject of this appeal, both USAC's and the FCC's governance and interpretation of the E-rate rules were changing. Thus, it has not always been clear to school districts when their conduct might be open to interpretation. Beginning in 1998, the School District relied on its then-Technology Coordinator, Nate Arbogast, to draft the School District's technology plan and prepare the School District's applications to the E-rate program. Mr. Arbogast had joined the School District in 1996, prior to the beginning of the E-rate program nationwide. When he did so, Mr. Arbogast fully disclosed to the School District that he operated a family-run independent technology and computer business, called Arbogast Business Services ("ABS"). See Exh. 3. In the late 1990s, expertise in the internet and network connectivity were rare—especially so in rural Oregon—and the School District looked to Mr. Arbogast as its Technology Coordinator, for expertise in this area.

From the beginning of the E-Rate program, the School District found it very difficult to find service providers who were willing to bid on the relatively small projects needed by the School District. Due to the School District's small size and remote location, many of the larger service providers were not interested in bidding on MCSD's projects. ABS was one of the small service providers that were willing to bid on School District E-rate projects, when other larger companies would not or could not fill such need. At the time, ABS, as the only Cisco-authorized installer in the area, filled some of this void, thereby allowing the School District to participate in E-Rate. During this time, Mr. Arbogast was listed as the contact person on the School District's E-rate forms.

As noted, Mr. Arbogast's role as the School District's Technology Coordinator/E-rate contact person, and the owner/operator of ABS, which was an E-rate service provider for the School District, was fully disclosed to the School District. See Exh. 3. Mr. Arbogast and the School District followed the disclosure and related obligations prescribed by the Oregon statutes and School District Policy, and all persons involved believed there was full compliance with E-rate regulations, as well as Oregon law and School District Policy.¹ Nonetheless, Mr. Arbogast's situation led to objections from USAC, culminating in the denial of E-rate funding to the School District in Funding Year 2002, and, five years later, COMAD letters seeking recovery of additional funds from Funding Year 2001.

¹ That relationship is discussed more fully in the School District's pending Appeal in cases Nos. 02-6; 96-45.

While the School District always maintained an honest and open bidding process and complied with local law, once the School District became aware of USAC's view that Mr. Arbogast should not be signing E-rate forms, it immediately changed its procedures. From then on, Mr. Arbogast was no longer the contact person for E-rate forms. Such role was transferred first to Ms. Mary Ann Munkers, and then to her successor, Tami Sneddon, both of whom acted as the Technology Secretary for the School District.² Neither Ms. Munkers nor Ms. Sneddon were associated with or employed by any service provider, nor has USAC made any such assertion.

MDC is a local, quasi-governmental, non-profit corporation formed to help deliver services to small businesses in Morrow County, and in particular to assist small businesses working with the USDA's Intermediary Relending Program. The goal of MDC is to promote economic growth in Morrow County. Over time, as awareness of the importance of internet access to the region's future economic development became apparent, MDC became more involved in work to spread internet service through Morrow County. This work was consistent with MDC's core mission of providing economic stimulus to this historically underdeveloped region of the state. MDC eventually came to work with the School District to assist with the installation of electronic services equipment. In this role, MDC's governmental nature cannot be ignored. MDC was always seen by the School District as acting in its governmental role, and was viewed as distinguishable from traditional for-profit providers.

Just as it had faced in the early years of the E-rate program, the School District frequently found that larger service providers were uninterested in working in Morrow County with its relatively sparse, dispersed population, and limited economic activity. Despite the low level of interest from service providers, in each case, however, the School District took extraordinary steps to obtain bids from multiple service providers by placing advertisements in local papers, and by soliciting bids directly from various service providers. This process of obtaining bids and complying with both Oregon and FCC rules was overseen by School District employees other than Mr. Arbogast, up to and including the Superintendent of the School District.

IV. ARGUMENT ON APPEAL

1. Overview of Argument.

In its COMAD letters, USAC does not cite any legal authority or precedent to support its claim that the School District violated an FCC regulation. Rather, USAC asserts that the School District violated "FCC rules" by selecting a vendor "associated" with a School District employee, Mr. Nate Arbogast. However, Mr. Arbogast did not sign, and was not listed as a contact person, on any Form 470 or 471 under appeal, nor does USAC assert that Mr. Arbogast did so. USAC's failure to cite any authority is telling, because the fact is that no such authority exists. The undisputed facts show that the School District's Form 470s and 471s at issue were

² One of the Form 470s at issue in this appeal, 378760000479541, was signed by Rhonda Lorenz, the School District's longtime business manager. Ms. Sneddon, the Technology Secretary, was the listed contact person on this Form 470. Exh. 4.

signed by, and the bidding process managed by, disinterested School District employees with no relationship to any service provider. The FCC has never adopted the "associated with" test seemingly articulated by USAC in its COMAD letters in this case. As such, USAC's determination must be reversed.

In addition to the fact that the School District's Form 470s facially comply with the applicable regulations, USAC's determination conspicuously omits any straightforward accusation of impropriety. USAC cites no specific rules that it alleges the School District violated. As the FCC has made clear, USAC cannot deny funding without first finding an *actual* violation of the competitive bidding process. Here, all USAC has done is make vague allusions to the existence of a relationship that "would" have influenced the competitive bidding process. This is significantly less than finding that such a relationship in fact "did" influence the competitive bidding process (which, of course, it did not). There is no accusation, let alone evidence, that Mr. Arbogast's consulting relationship with MDC in any way influenced or undermined the integrity of the bidding process.

Finally, while the School District believes that the evidence conclusively shows its compliance with all applicable regulations, if the FCC does determine that a violation occurred (whether under then-existing regulations or as a result of the FCC's extension of those regulations), then the School District requests that the FCC waive its rules in this case. The record reflects that the School District made a determined effort to comply with the rules by insuring that appropriate measures were taken to maintain the integrity of the competitive bidding process. Further, each of the three challenged E-rate projects was awarded to the lowest bidder in a competitive setting. Finally, for many years the School District received no E-rate funding at all, despite applications to the program. In light of such a good-faith effort, the equities weigh in favor of granting the School District a waiver.

Furthermore, the financial burden of repaying more than \$2.3 million when that money was already spent many years ago would devastate the School District's ability to function and educate the children it is charged with providing for. First, the money sought was never received by the School District. Rather, the money was provided to the School District's service provider, Morrow Development Corporation, who used the funds to connect the School District's students to the internet—work which was indisputably performed. Indeed, the School District paid over \$200,000 of its own funds to cover its share of those expenses.

Second, should the FCC seek to recover the amounts set forth in the COMAD letters from the School District, the impact on the ability of the School District to adequately perform its core educational mission would be catastrophic. Indeed, such a fine would threaten the ability of the School District to even continue to function. Such an impact will, of course, fall most heavily on the children of Morrow County, approximately 60% of whom already face significant economic disadvantages and participate in the National School Lunch Program. The economic crisis gripping the country has not passed Morrow County by. The School District's funding has been decreasing for several years, necessitating cuts in student programs and teacher and staff salary freezes. The annual budget for the School District hovers at \$18 million.

Cutting \$2.3 million (which is more than ten percent of the School District's already bare budget) cannot be done without significantly impairing its ability to educate the public school children of Morrow County, Oregon.

The E-rate program was intended to assist rural and poor school districts in obtaining access for their students to the important benefits of internet access and networked computers. In participating in the program, the Morrow County School District hoped to bring those benefits to its students so that they would be better educated, and better able to compete in the global economy as citizens of the 21st century. USAC does not allege that the E-rate projects under appeal were not actually performed, and there has been no allegation that the E-Rate program or the School District over-paid for any of that work. All that USAC can point to is a relationship which, in USAC's opinion, hypothetically *could have* contributed to an undermining of the competitive bidding process. The FCC should not make E-rate a game of "Russian Roulette" whereby a rural school district seeking to participate in the E-Rate program to benefit its students faces financial ruin if there are technical missteps in efforts to comply with numerous regulations. For these reasons, a waiver of the rules is necessary here, should liability be found.

2. The School District's Process Was Fair and Competitive.

A. The School District did not violate *MasterMind* and USAC has cited no specific precedent that it alleges was violated.

The Form 470 filed by every E-Rate applicant must list a contact person from whom interested bidders may obtain additional information regarding the proposed project. In *Request for Review by Mastermind Internet Services, Inc.*, CC Docket Nos. 95-45, Order, 16 FCC Rod 4028, FCC 00-167 (rel. May 23, 2000) (hereinafter "*MasterMind*") and its progeny, the FCC established a clear test regarding the impermissible role of potential service providers who wear "two hats" by simultaneously bidding on a project and acting as the school district's designated Form 470 contact person. *MasterMind* grew out of the FCC's experience in the early days of the E-rate program when outside consultants who were retained to assist schools with the E-rate program appeared to be manipulating the process to their own benefit. In *MasterMind*, the FCC held that when a service provider's employee acts as the school district's contact person, the dual role "taints" the competitive bidding process, rendering the Form 470 invalid. *MasterMind*, and the subsequent decisions interpreting and applying its holding, are the only FCC precedents that give school districts guidance on how to structure their E-Rate programs when school district employees have a relationship with a service provider. In the instant case, the evidence shows that the School District did, in fact, comply with *MasterMind*, and accordingly the COMAD letters must be overturned.

The *MasterMind* case addressed two scenarios: (1) instances in which the school district's Form 470 listed a MasterMind company employee as the school district contact person; and (2) instances in which MasterMind company employees were involved in the drafting of the Form 470, but did not sign them and were not listed as contact persons. With respect to this latter category, the SLD found that "the circumstances surrounding the filing of the Form 470

associated with the funding request violated the intent of the bidding process.” *MasterMind* at ¶ 4. Under review, however, the FCC disagreed that the mere involvement of a service provider in the preparation of a Form 470 tainted the bidding process. Accordingly, the FCC remanded for further processing where “SLD denied requests for support that did not name a service provider as the contact person on the Form 470.” *Id.* at 9. The FCC held that where a Form 470 “did not name a MasterMind employee as the contact person and a MasterMind employee did not sign the associated Forms 470 or 471 . . . there has been [no] violation of the competitive bidding process.” *Id.* at ¶ 14. The same result should follow in the instant case. Indeed, USAC has not alleged (nor could it) that the Morrow County School District’s listed contact person or its Form 470/471 signatories were service provider employees. As noted, such persons were Tami Sneddon and Rhonda Lorenz. There has been no allegation from USAC that either woman was associated with a service provider, and in fact, neither woman was associated with a service provider. See Exh. 5 (Declarations of Sneddon and Lorenz).

Paramount in the FCC’s *MasterMind* decision was the concern over access to information by prospective bidders. To that end, *MasterMind* focused on the importance of a disinterested school district contact person who could encourage bidders, and direct them to the appropriate requests for proposals. Not surprisingly, all of the subsequent cases building on *MasterMind*’s foundation have focused on the nature of the relationship between the school district’s designated Form 470 contact person and the service provider. For example, in *Carethers*, the issue was whether the school district contact person (who was married to an employee of the service provider) was a representative of the service provider. 16 FCC Red 6944 (2001) ¶ 8. And in *College Prep*, the issue was whether “the individual listed as the contact person on the applicants’ FCC Form 470 was in fact associated with the service provider with whom the applicants contracted for service.” 17 FCC Red 1738 (CCB 2002) ¶ 6. These cases contrast sharply with the facts in this appeal—USAC has not alleged that Morrow County School District’s contact person for the E-rate projects under appeal (Tami Sneddon) had any relationship whatsoever with the service provider. Rather, USAC focuses on Mr. Arbogast, who was not the contact person or a signatory to the FCC forms in question. But USAC has not cited any decision, nor has research revealed any authority, which inquires into the relationship between any school district employee *who is not the contact person* (such as Mr. Arbogast) and a service provider.

Furthermore, none of the prudential concerns raised in the *MasterMind* line of decisions are present here. In this case, there is no dispute that the contact person listed on the School District’s Form 470s and 471s, Tami Sneddon, had no relationship whatsoever to any service provider. To be clear, USAC makes no such allegation as to Ms. Sneddon. Nate Arbogast, to whom USAC points in their Commitment Adjustment Letters as the source of the alleged violation, *did not sign, and was not a contact person, for the Form 470s and 471s in question here.* Nor is there any evidence that Mr. Arbogast was involved in the FY2003 or FY2004 competitive bidding process. Just as in *MasterMind*, the involvement of a service provider in the drafting of the forms is insufficient to find that the competitive bidding process was violated though no such involvement has been demonstrated either. USAC’s conclusory accusations that

Mr. Arbogast's role "would" have unfairly influenced the bidding process is insufficient in light of *MasterMind* to justify the COMAD letters.

To the extent that the FCC would announce a new rule in this case that would expand the scope and application of the *MasterMind* decision beyond the listed contact person, the application of such a new rule would be unfair and inequitable to the School District.³ It is a fundamental precept of our legal system that a party must be given notice of the rules it will be held to, and thereby given an opportunity to conform its conduct to known standards. To hold otherwise, to endorse an *ex post facto* rule, would work a great injustice upon the School District. In appointing Ms. Sneddon as the E-Rate Form 470 and Form 471 contact person, the School District believed it was complying, and in fact did comply, with all then-existing FCC standards. To hold the School District responsible under a new rule, under these circumstances, would simply be unfair.

B. The bidding process was competitive.

Per binding FCC precedent, USAC has the burden of proof to show that there was an improper relationship that influenced the competitive bidding process. But even under the *per se* rationale of *MasterMind*, USAC has not carried its burden. USAC cannot establish that a non-competitive process was used (nor does it proffer any facts to support such a contention). The record in this matter demonstrates that the School District did everything it could to obtain multiple bids in compliance with both FCC and Oregon public procurement requirements. Under FCC regulations, once a Form 470 is submitted, the applicant must wait 28 days for bids to be submitted. Following that period, bids may be considered, with price as the most important factor in awarding the contract.

The record in this case shows that the School District did everything it could to obtain multiple, competitive bids from service providers. Following are the details of the three Funding Request Numbers ("FRNs") under appeal:

Funding Request Number 980359 – Internet Access

In November 2002, Tami Sneddon placed the call for bids for FY2003-eligible services in the local newspaper. See Exh. 6. Subsequently, on December 4, 2002, Ms. Sneddon was listed as the School District's point of contact in an "Announcement of Call for Bids" for high capacity Internet service that appeared in the Heppner Gazette Times for FY2003. See *Id.* Ms. Sneddon also directly solicited quotations for Internet access and installation from three bidders: Qwest, CenturyTel, and Morrow Development. See Exh. 7, Morrow County School District, "Three Price Bids," signed by Tami Sneddon on January 17, 2003, and Superintendent Jack Crippen on January 28, 2003. Morrow Development was selected based on the speed of its

³ USAC itself lacks the power to make new rules regarding E-rate administration; its role is limited to the enforcement of the FCC's regulations. 47 C.F.R. § 54.702(c); *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, 13 FCC Rcd 25058, 25066-67 (1998).

Internet offering as well as cost. As Exhibit 7 evidences, neither of the other carriers that were solicited could offer OC-12 service (as required) for the School District.

Funding Request Number 994429 – Internal Connections

Similarly, with respect to the internal network connections work, Form 471 361855, a January 30, 2003 bid sheet from the School District shows that Ms. Sneddon solicited quotations from three bidders: IMC Networks, Computers4Sure, and Morrow Development. See Exh. 8. That same worksheet shows that bids were received from all three companies. Morrow Development was the lowest bidder, and had an established history of providing quality service to the School District.

Funding Request Number 1135124 – Telecomm Services

Finally, in a separate three-bid comparison for telecommunications services for FY2004, Ms. Sneddon is listed as the School District representative securing quotations. See Exh. 9.

As the School District explained to USAC in an April 28, 2003 letter in response to a request for information on the School District's vendor selection process, "all [awards] were for 'lowest quote.' When awarding our Internet service provider, consideration was also give[n] to what speed was available as well as cost." See Exh. 10. It is further worth noting that Morrow Development did not win all of the contracts that it submitted bids for, which is inconsistent with the idea that some type of manipulation of the process was occurring, and is fully consistent with an open and transparent bidding process. See Exh. 11. Accordingly, there is no evidence of any improper bidding procedure or violation of the competitive bidding process.⁴

3. USAC Has Failed To Allege An Actual Violation Of Competitive Bidding Rules.

Before USAC may seek to recover funds, it must first establish that a violation has actually occurred. The FCC held in the *Academy of Careers* decision that USAC may not "presume" a violation to have taken place. 21 FCC Rod 5348, ¶1. Rather, it is USAC's obligation to establish by affirmative evidence that funds should be rescinded. The COMAD letters in this matter fall far short of carrying this burden because such letters only allege that Mr. Arbogast's relationship with a service provider "would" furnish the service provider with "inside" information and "would" "unfairly influence the outcome of a competition." As discussed above, there was no such unfair influence in this case. But as established by, *inter alia*, *Academy of Careers*, the burden of proof lies first on USAC to show a violation. It is not the School District's obligation to establish its innocence in the first instance. Nor should the School District be placed in the unenviable position of seeking to rebut accusations made in only the most generic hypothetical and conclusory fashion, without citation to specific evidence and

⁴ The School District also followed its own purchasing guidelines which address how to resolve possible conflicts of interest. Exh. 12 at ¶ 12. Those guidelines were also provided to USAC.

legal authority. Because USAC has failed to show any violation, its COMAD letters must be overturned.

4. USAC Has Shown No Evidence That Mr. Arbogast Was Responsible For Selecting Service Providers.

As shown above, the first focus must be on the integrity of the Form 470s, which are on their face unassailable in this case. There is no legal support for USAC's proposition that the mere fact that a person working with a provider also works for a school district constitutes impermissible "involvement" (however such an amorphous term might be defined or applied) of the service provider in the selection of winning bidders. Rather, USAC must show some actual taint in the bidding process caused by the relationship. No such taint can be found here.

As a factual matter, USAC has presented no evidence supporting its accusation that Nate Arbogast was responsible for "the selection of the applicant's service providers." As demonstrated above, the service providers at issue in this appeal were selected following a competitive bidding process in which bids were actively solicited and received. The School District's Superintendent, or the School Board, made the final decision regarding what vendor to select, based almost exclusively on price and only in response to bids submitted to the School District. See Exh. 7-8 (Letters from J. Crippen, Superintendent, to service providers notifying them that they have been selected). There is simply no evidence in the record for USAC to assert that Mr. Arbogast had involvement in the "selection of service providers." In any event, the "selection" was made based wholly on cost. This is consistent with the E-rate principle that cost should be a primary concern in making contract awards.

5. Request for Waiver.

Although the School District believes that its actions were fully consistent with FCC rules in administering the E-rate program, in the event the Commission reaches a different conclusion, the School District requests a waiver of the application of the Rules. The School District made every effort to comply with the competitive bidding processes required by FCC and Oregon regulations. In 2005, the FCC acknowledged that "the E-rate program is fraught with complexity from the perspective of beneficiaries and the program rules and guidelines have changed many times."⁵ The FCC expressed concern that "the complexity of the application process leads some small schools and libraries to choose not to participate in the E-rate

⁵ *Request for Waiver by Greenfield Public School District*, CC Docket No. 02-6, Order, File Nos. SLD-431911, SLD-431129, DA 06-487 (rel. Feb. 28, 2006), citing *Comprehensive Review of Universal Service Fund, Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-195, 02-60, 03-109, CC Docket Nos. 96-45, 02-6, 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Red 11308 (2005).

program.”⁶ The Morrow County School District knows, perhaps better than most, just how complex those regulations can turn out to be.

As noted above, after the FCC had objected to the role of Mr. Arbogast overseeing the School District’s E-rate program in 2002, those aspects of his responsibilities were transferred to another staffer, Ms. Munkers, and then to Ms. Sneddon. As noted, Ms. Sneddon, who was the School District’s contact person for the FCC forms in question in the instant case, had no relationship with any service provider, nor has USAC alleged as much. Ms. Sneddon, together with the School District’s Superintendent, oversaw the bidding process which, as detailed above, was competitive.

A. There is no evidence of waste, fraud, or abuse, misuse of funds, or a failure to adhere to core program requirements.

At most, the alleged violations in this case are based on nothing more than suppositions of hypothetical impacts of relationships. As the FCC has stated, “the competitive bidding rules are a central tenet of program funding and a tool for preventing waste, fraud, and abuse.”⁷ Although USAC claims that the School District violated the competitive bidding rules, there is no evidence or suggestion of waste, fraud, or abuse, misuse of funds, or a failure to adhere to core program requirements. There is no allegation that the work performed by MDC was substandard in any way, or that the work was not performed. To the contrary, the evidence is that the services provided by MDC were valuable to the School District and essential to increasing internet access for Morrow County’s public school children. The FCC has been inclined to waive program violations in instances where there is a violation that does not undermine “the statutory goal mandated by Congress of preserving and advancing universal service among schools and libraries most in need of support.” *Request for Review and/or Waiver by Glendale Unified School District, Glendale, California*, CC Docket No. 02-6, Order, File No. SLD-143548, DA 06-244 (rel. February 1, 2006). Such is the case here.

B. The potential for extreme hardship weighs in favor of waiver.

The School District is unable to repay the millions of dollars sought by USAC without gutting its essential services to its students. Due to the recent national recession, the School District’s funding for 2010 has been reduced to pre-2001 levels. The School District’s entire 2010 budget is only \$18.5 million. This has necessitated freezes in employee salaries, elimination of staff positions, and reductions in student programming. As the year unfolds, additional cuts may be required as funding becomes less available from the State of Oregon, and

⁶ *Comprehensive Review of Universal Service Fund, Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-193, 02-60, 02-109, CC Docket Nos. 96-43, 02-b, 97-21. Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Red 11308 (2005).

⁷ *Id.*

the prospects for the School District's financial health in 2011 and beyond are no better. Making room in an already over-stretched budget for an additional \$2.3 million in penalties would, in all likelihood, result in irreparable harm to the School District, and would threaten the ability of the School District to function. Where, as here, the alleged violations are hypothetical and do not go to E-rate's core mission, imposing such a hardship on the students of Morrow County for the alleged actions of one employee – Mr. Arbogast – who is no longer even a School District employee would be a supreme inequity. This further justifies a waiver of the rules in this case.

C. The School District has already suffered a significant penalty.

Since 2004, the School District as well as the greater Umatilla-Morrow area, served by the Umatilla-Morrow Education Service District, received no E-rate funding for many years despite submitting applications every year. Although USAC has never specifically informed the School District that its denial of E-rate funds was tied to these cases, the end result has been that the School District has been effectively excluded from the E-Rate program for many years. Recently the School District did receive an award for a nominal amount of E-rate funding for telecommunications services, but that amount is still significantly below the amount awarded to similar school districts. In effect, by denying E-rate funding for many years, USAC has already censured the School District.

V. ALLOCATION OF RECISSION RESULTING FROM ANY ADVERSE FINDING

As noted in the Notification of Commitment Adjustment letters, "USAC will seek recovery of any disbursed funds *from the applicant and service provider.*" (emphasis added). Exh. 1 (Notification of Commitment Adjustment letters). As set forth above, the School District complied with all of the applicable regulations in making its applications for E-Rate funds, and the FCC should grant the School District's appeal of the COMAD letters. However, in the event that the FCC does not grant the School District's appeal and does not grant a waiver of the rules, then the School District submits that MDC should be held liable for the amounts sought by USAC, not the School District.

To the extent the FCC determines that a violation occurred, the party that benefited from that violation ought to bear the burden of the COMAD letters. Inherent in the determination that a violation occurred is a finding that some untoward influence on the bidding process resulted in an improper advantage or benefit to the service provider. It is internally inconsistent to hold that the School District should be penalized where there is no evidence that the School District received any benefit from the alleged violation. To the extent anyone profited from these contracts, or stood to benefit from the alleged influence of Mr. Arbogast, it was MDC, not the School District.

VI. CONCLUSION

USAC demands that the School District disgorge millions of dollars in E-rate funds that were spent almost ten years ago. There is no allegation that the money was spent on anything other than what it was intended for—providing technology and connectivity to a disadvantaged rural school district. There is no evidence of any violation of the competitive bidding process. There is no evidence that MDC improperly benefited from these contracts. There is no evidence that any relationship between Mr. Arbogast and MDC was concealed. In contrast, the actual evidence demonstrates that the School District used a transparent bidding process in which disinterested School District employees made decisions about which service provider to choose. The School District embarked on these projects in good faith, and MDC delivered the services it was supposed to deliver.

Further, the School District has no money available to it to satisfy the COMAD letters. The School District's budget cannot absorb this cost without decimating basic school services. Thus, even if the Commission determines that a technical violation occurred, the School District asks that the Commission waive the application of the rules in this case. The important protections of the competitive bidding process would not be undermined by such a waiver where the violation (if found) is of such a technical nature, and where a finding of liability would represent an expansion and extension of existing precedent in an unforeseen way. There is ample good cause for such a waiver under these circumstances.

The School District asks the Commission to consider the actual record and facts before it. The COMAD letters set out a hypothetical conflict of interest that "would" have influenced the bidding process. Even as it seeks millions of dollars in restitution, USAC will not state that an actual violation of any rule occurred. The E-rate program is designed to help school districts, like the one in Morrow County, to provide a better education for their students. That goal will not be advanced by bankrupting the Morrow County School District. For these reasons, the School District asks that the Commission vacate the COMAD letters and close this case.

Respectfully submitted,

Handwritten signature of William M. Sullivan, Jr. in black ink, with the initials "WMS" written to the right of the signature.

William M. Sullivan, Jr., Esq.
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 20006
Tel. (202) 282-5000
Fax (202) 282-5100
email: wsullivan@winston.com

Attachments



Notification of Commitment Adjustment Letter
Funding Year 2003: 7/01/2003 - 6/30/2004

January 15, 2009

TAMI SNEDDON
MORROW COUNTY SCHOOL DIST 1
270 W MAIN ST
LEXINGTON, OR 97839

Re: Form 471 Application Number: J61855
Funding Year: 2003
Applicant's Form Identifier: MCSD0304ISP
Billed Entity Number: 145127 - MCSD
FCC Registration Number: 0012534509
SPIN Name: Morrow Development Corp
Service Provider Contact Person: Eileen Hendricks

Our routine review of Schools and Libraries Program funding commitments has revealed certain applications where funds were committed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the adjustments to your funding commitment required by program rules, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the program rule violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of the Demand Payment Letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at <http://www.universalservice.org/fund-administration/tools/latest-news.aspx#083104> for more information regarding the consequences of not paying the debt in a timely manner.

TO APPEAL THIS DECISION:

If you wish to appeal the Commitment Adjustment Decision indicated in this letter, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Numbers you are appealing. Your letter of appeal must include the Billed Entity Name, the Form 471 Application Number, Billed Entity Number, and FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using your organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Dept. 125 - Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Appeals Area of the SLD section of the USAC web site or by contacting the Client Service Bureau at 1-888-203-8100. We strongly recommend that you use the electronic appeals options.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site, or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. Immediately preceding the Report, you will find a guide that defines each line of the Report.

The SLD is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on those Funding Request Numbers, a separate letter will be sent to the service provider detailing the necessary service provider action.

Please note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Please note the Funding Commitment Adjustment Explanation in the attached Report. It explains why the funding commitment is being reduced. Please ensure that any invoices that you or your service provider submit to USAC are consistent with program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Eileen Hendricks
Morrow Development Corp

A GUIDE TO THE FUNDING COMMITMENT ADJUSTMENT REPORT

A report for each E-rate funding request from your application for which a commitment adjustment is required is attached to this letter. We are providing the following definitions for the items in that report.

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SERVICES ORDERED: The type of service ordered from the service provider, as shown on Form 471.

SPIN (Service Provider Identification Number): A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support mechanisms. A SPIN is also used to verify delivery of services and to arrange for payment.

SERVICE PROVIDER NAME: The legal name of the service provider.

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BILLING ACCOUNT NUMBER: The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on your Form 471.

SITE IDENTIFIER: The Entity Number listed in Form 471, Block 5, Item 22a. This number will only be present for "site specific" FRNs.

ORIGINAL FUNDING COMMITMENT: This represents the original amount of funding that SLD had reserved to reimburse you for the approved discounts for this service for this funding year.

COMMITMENT ADJUSTMENT AMOUNT: This represents the amount of funding that SLD has rescinded because of program rule violations.

ADJUSTED FUNDING COMMITMENT: This represents the adjusted total amount of funding that SLD has reserved to reimburse for the approved discounts for this service for this funding year. If this amount exceeds the Funds Disbursed to Date, the SLD will continue to process properly filed invoices up to the new commitment amount.

FUNDS DISBURSED TO DATE: This represents the total funds that have been paid to the identified service provider for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM APPLICANT: This represents the amount of improperly disbursed funds to date as a result of rule violation(s) for which the applicant has been determined to be responsible. These improperly disbursed funds will have to be recovered from the applicant.

FUNDING COMMITMENT ADJUSTMENT EXPLANATION: This entry provides an explanation of the reason the adjustment was made.

**Funding Commitment Adjustment Report for
Form 471 Application Number: 361855**

Funding Request Number:	980359
Services Ordered:	INTERNET ACCESS
SPIN:	143023033
Service Provider Name:	Morrow Development Corp
Contract Number:	N/A
Billing Account Number	541-989-8202
Site Identifier:	145127
Original Funding Commitment:	\$1,570,560.00
Commitment Adjustment Amount:	\$1,570,560.00
Adjusted Funding Commitment:	\$0.00
Funds Disbursed to Date:	\$1,570,560.00
Funds to be Recovered from Applicant:	\$1,570,560.00

Funding Commitment Adjustment Explanation:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of a review it was determined that the school employee who was involved in determining the services sought by the applicant and the selection of the applicant's service providers is associated with a service provider that was selected. Nate Arbogast, the technology director of the school, is also an employee of the service provider selected to provide services for this FRN. FCC rules require applicants to submit a Form 470 to initiate the competitive bidding process, and to conduct a fair and open process. Neither the applicant nor the applicant's consultant should have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow it to unfairly compete in any way. Since the applicant has engaged in an improper relationship with a selected service provider, which represents the conflict of interests and compromises the competitive bidding process, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the applicant and service provider.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

EDIE ALLSTOTT
MORROW COUNTY SCHOOL DIST 1
2001 SW NYE AVE.
PENDLETON, OR 97801



Schools & Libraries Division

Notification of Commitment Adjustment Letter

Funding Year 2003: 7/01/2003 - 6/30/2004

January 15, 2009

**TAMI SNEDDON
MORROW COUNTY SCHOOL DIST 1
270 W MAIN ST
LEXINGTON, OR 97839**

**Re: Form 471 Application Number: 366035
Funding Year: 2003
Applicant's Form Identifier: MCSD0304ICN2
Billed Entity Number: 145127 - MCSD
FCC Registration Number: 0012534509
SPIN Name: Morrow Development Corp
Service Provider Contact Person: Elteen Hendricks**

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Schools and Libraries Division
Universal Services Administrative Company

cc: Eileen Hendricks
Morrow Development Corp

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FUNDING COMMITMENT ADJUSTMENT EXPLANATION: This entry provides an explanation of the reason the adjustment was made.

**Funding Commitment Adjustment Report for
Form 471 Application Number: J66035**

Funding Request Number:	994429
Services Ordered:	INTERNAL CONNECTIONS
SPIN:	143023033
Service Provider Name:	Morrow Development Corp
Contract Number:	N/A
Billing Account Number:	541-989-8202
Site Identifier:	145127
Original Funding Commitment:	\$6,277.50
Commitment Adjustment Amount:	\$6,277.50
Adjusted Funding Commitment:	\$0.00
Funds Disbursed to Date:	\$6,277.50
Funds to be Recovered from Applicant:	\$6,277.50
Funding Commitment Adjustment Explanation:	

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of a review it was determined that the school employee who was involved in determining the services sought by the applicant and the selection of the applicant's service providers is associated with a service provider that was selected. Nate Arbogast, the technology director of the school, is also an employee of the service provider selected to provide services for this FRN. FCC rules require applicants to submit a Form 470 to initiate the competitive bidding process, and to conduct a fair and open process. Neither the applicant nor the applicant's consultant should have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow it to unfairly compete in any way. Since the applicant has engaged in an improper relationship with a selected service provider, which represents the conflict of interests and compromises the competitive bidding process, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the applicant and service provider.

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